

Date of Hearing: April 11, 2023

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Jesse Gabriel, Chair

AB 1546 (Gabriel) – As Introduced February 17, 2023

SUBJECT: California Consumer Privacy Act of 2018: statute of limitations

SYNOPSIS

This measure, sponsored by the Office of Attorney General Rob Bonta, would align the statutes of limitations for civil and administrative enforcement of the California Consumer Privacy Act (CCPA) by providing the Attorney General five years to bring a civil action to enforce the CCPA. Five years is the same period of time that the California Privacy Protection Agency (Privacy Agency) currently has to bring an administrative action to enforce the CCPA.

Current law does not specify a statute of limitations for CCPA civil enforcement. Without this bill, the current, default statute of limitations for CCPA civil enforcement—an unreasonably short period of only one year—will stay in place, and the Attorney General’s ability to safeguard Californians’ privacy will remain significantly diminished. As detailed herein, the steps involved in investigating and preparing a meritorious CCPA lawsuit once privacy violations come to light are complex. One year is generally insufficient to complete these steps.

The absence of a statute of limitations for civil enforcement appears to be the result of a drafting oversight. Other CCPA provisions clearly envision the Attorney General having more than one year to bring a lawsuit, particularly a provision that bars the Attorney General from suing a business for violations after the Privacy Agency has already enforced against the business.

The five-year statute of limitations should not place additional administrative burdens on businesses, since these businesses must already preserve records for five years in order to comply with the Privacy Agency’s statute of limitations.

However, an actual burden imposed by a one-year statute of limitations is that a business may be exposed to two parallel enforcement actions, one civil (for non-CCPA privacy violations) and one administrative (for CCPA violations), rather than a single civil case.

The bill is supported by the Electronic Frontier Foundation and Oakland Privacy. It is opposed by a coalition of seventeen business trade associations, led by the California Chamber of Commerce.

If passed by this Committee, the bill will next be heard by the Assembly Judiciary Committee.

SUMMARY: Fixes a drafting oversight by amending the California Consumer Privacy Act (CCPA) to expressly permit the Attorney General to file a civil action within five years, rather than the current default of one year, thereby aligning the statute of limitations for civil enforcement by the Attorney General with the five-year statute of limitations for administrative enforcement by the California Privacy Protection Agency. Specifically, **this bill** provides that an action by the Attorney General to enforce the CCPA must be commenced within five years after the cause of action accrued.

EXISTING LAW:

- 1) Establishes the California Consumer Privacy Act (CCPA). (Civ. Code §§ 1798.100-1798.199.100.)
- 2) Provides that the CCPA applies to any for-profit entity that collects consumers' personal information, does business in California, and meets one or more of the following criteria:
 - a) It had gross annual revenue of over \$25 million in the previous calendar year.
 - b) It buys, receives, or sells the personal information of 100,000 or more California residents, households, or devices annually.
 - c) It derives 50% or more of its annual revenue from selling California residents' personal information. (Civ. Code § 1798.140(d).)
- 3) Defines "consumer" as a natural person who is a California resident. (Civ. Code § 1798.140(i).)
- 4) Provides a consumer, subject to exemptions and qualifications, various rights, including the following:
 - a) The right to know the business or commercial purpose for collecting, selling, or sharing personal information and the categories of persons to whom the business discloses personal information. (Civ. Code § 1798.110.)
 - b) The right to request that a business disclose the specific pieces of information the business has collected about the consumer, and the categories of third parties to whom the personal information was disclosed. (Civ. Code § 1798.110.)
 - c) The right to request deletion of personal information that a business has collected from the consumer. (Civ. Code § 1798.105.)
 - d) The right to opt-out of the sale of the consumer's personal information if the consumer is over 16 years of age. (Sale of the personal information of a consumer below the age of 16 is barred unless the minor opts-in to its sale.) (Civ. Code § 1798.120.)
 - e) The right to equal service and price, despite the consumer's exercise of any of these rights, unless the difference in price is reasonably related to the value of the customer's data. (Civ. Code § 1798.125.)
- 5) Defines "personal information" as information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household. Personal information includes such information as:
 - a) Name, alias, postal address, unique personal identifier, online identifier, IP address, email address, account name, social security number, driver's license number, passport number, or other identifier.

- b) Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.
 - c) Biometric information.
 - d) Internet activity information, including browsing history and search history.
 - e) Geolocation data.
 - f) Professional or employment-related information. (Civ. Code § 1798.140(v).)
- 6) Establishes the California Privacy Protection Agency (Privacy Agency), vested with full administrative power, authority, and jurisdiction to implement and enforce the CCPA. The Privacy Agency is governed by a five-member board, with the chairperson and one member appointed by the Governor, and the three remaining members are appointed by the Attorney General, the Senate Rules Committee, and the Speaker of the Assembly. (Civ. Code § 1798.199.10.)
 - 7) Specifies procedures whereby the Privacy Agency may bring administrative enforcement actions to address CCPA violations. (Civ. Code §§ 1798.199.45, 1798.199.50, 1798.199.55, 1798.199.60.)
 - 8) Establishes administrative penalties for CCPA violations, to be recovered through administrative enforcement actions brought by the Privacy Agency. (Civ. Code § 1798.155.)
 - 9) Provides five years from the date upon which a violation of the CCPA occurred for the Privacy Agency to bring an administrative enforcement action. (Civ. Code § 1798.199.70.)
 - 10) Establishes civil penalties for CCPA violations, to be recovered through a civil action brought on behalf of the people of the state of California by the Attorney General. (Civ. Code § 1798.199.90(a).)
 - 11) Prohibits the Attorney General from filing a civil action under the CCPA after the Privacy Agency has issued a decision or an order against that person for the same violation. (Civ. Code § 1798.199.90(d).)
 - 12) Provides the Attorney General, in the absence of a longer statutory limitations period, a default period of one year to bring an action for a civil penalty on behalf of the people of the state of California. (Code Civ. Proc. § 340(b).)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS:

1) **Background.** This bill proposes to align the statutes of limitations for civil and administrative enforcement of the California Consumer Privacy Act (CCPA), thereby providing the Attorney General five years to bring a civil action to enforce the CCPA. Five years is the same period of time that the California Privacy Protection Agency (Privacy Agency) currently has to bring an administrative action to enforce the CCPA. Current law does not specify a statute of limitations

for CCPA civil enforcement. As explained below, this absence appears to be the result of a drafting oversight. Without this bill, the current, default statute of limitations for CCPA civil enforcement—an unreasonably short period of only one year—will stay in place, and the Attorney General’s ability to safeguard Californians’ privacy will remain significantly diminished.

2) **Author’s statement.** According to the author:

[O]ne year...is far too little time for the California Department of Justice to learn of a potential CCPA violation, conduct a thorough investigation, and file a civil lawsuit. By contrast, the California Privacy Protection Agency has five years to bring an administrative action to enforce the CCPA.

AB 1546 would increase the statute of limitations for CCPA enforcement by providing CalDOJ five years, not one year, to bring a civil enforcement action. By doing so, the bill seeks to enhance CalDOJ’s ability to carry out its duty to enforce California’s landmark privacy law, thereby enhancing the consumer privacy of all Californians.

3) **The California Consumer Protection Act (CCPA).** In 2018, the Legislature enacted the CCPA when it passed AB 375 (Chau, Chap. 55, Stats. 2018), a groundbreaking law that greatly enhanced privacy protections for Californians’ personal data. Under the CCPA, the authority to sue for the majority of violations lies exclusively with the Attorney General. But the CCPA has never specified how much time that the Attorney General has after a violation occurs to file a civil enforcement action. Because of this lack of specificity, the statute of limitations for civil CCPA enforcement defaults to Code of Civil Procedure Section 340(b), which allows only one year for public attorneys to file an action to enforce a statute and seek a civil penalty.

In 2020, voters approved Proposition 24, the California Privacy Rights Act, which amended the CCPA to, among other things, create the Privacy Agency, vested with full administrative power, authority, and jurisdiction to implement and enforce the CCPA. Among the Privacy Agency’s duties and powers is administrative enforcement authority over the CCPA. (Civ. Code § 1798.199.40.)

4) **What is the difference between civil and administrative enforcement of the CCPA?**

Briefly, civil enforcement of the CCPA requires the Attorney General to file a complaint in a trial court (generally, either the Superior Court of California or, as appropriate, a United State District Court) alleging that a business has violated one or more of the CCPA’s provisions. The case then proceeds in court until it settles, is dismissed, or the court issues a final decision.

Administrative enforcement of the CCPA generally does not involve the courts and is conducted under the auspices of the Privacy Agency itself. The case may be decided by the Privacy Agency or by an administrative law judge. (Civ. Code §§ 1798.199.55, 1798.199.60; Gov. Code §§ 11370.2(a), 11517.) Unlike the Attorney General, who may pursue violations of other, related laws together with CCPA violations in the same court case, the Privacy Agency is only authorized to enforce CCPA violations. An administrative hearing initiated by the Privacy Agency will generally proceed until it settles, is dismissed, or a final decision is issued, though this decision may then be appealed to the courts. (Civ. Code § 1799.199.85.) Administrative enforcement of the CCPA by the Privacy Agency is set to begin on July 1, 2023. (Civ. Code § 1798.185 (d).)

Proposition 24 vested the Privacy Agency with authority to bring an administrative action alleging any CCPA violation within five years after the date on which the violation occurred. (Civ. Code § 1798.199.70.) However, through an apparent oversight, Proposition 24 did not make a conforming change to the statute of limitations for the Attorney General’s civil enforcement of the CCPA.

5) **What this bill would do.** This bill consists of a single sentence: “An action by the Attorney General to enforce this title shall be commenced within five years after the cause of action accrued.” In other words, the bill would give the Attorney General five years to sue for a CCPA violation.

This period is significant because investigating and preparing a case alleging violations of online privacy laws is quite complex. Such a case often involves factual considerations, legal questions, and technical issues. To illustrate, a privacy enforcement case may require analyzing the flow of data to and from a business’s servers, including review of these flows by an expert technologist. Simultaneously, attorneys must analyze the legal and business arrangements between the business and third parties, including arrangements governed by statute, regulation, contract, privacy policies, and terms of use. These arrangements are then compared with the business’s data flows to assess the latter’s legality. Formal pre-lawsuit investigative tools, such as subpoenas, are often required to obtain needed information. If the targets do not comply with subpoenas, they must be enforced in court, further prolonging investigations. Preparing the case often also involves locating and interviewing witnesses, and engaging with third parties that may possess relevant information. As should be evident, these are complicated, time-consuming endeavors that can take much longer than one year—especially if one wants them done accurately in order to ensure that meritorious cases are prosecuted.

6) **What is the evidence that the lack of a five-year statute of limitations for civil enforcement is the result of a drafting oversight?** A coalition of bill opponents vigorously disputes that the one-year statute of limitations for civil CCPA enforcement is due to a drafting oversight. These opponents instead contend that the short limitations period was a deliberate choice, writing:

Fundamentally, we disagree that the lack of parity between the statute of limitations for administrative actions by the CPPA and civil enforcement by the AG was an oversight. Silence could easily be interpreted in multiple ways. For example, we would contend that existing law’s failure to provide the AG five years to commence an action after a violation occurs was intentional. Providing a brand-new agency with extended statute of limitations was a practical necessity, as it had zero enforcement capabilities at the time Proposition 24 was passed, and still has very little enforcement capabilities three years later as it continues to staff up. That is not the case for the AG and should be considered in weighing the appropriateness of providing parity here for two governmental bodies with vastly different resources. Moreover, parity is less compelling when you consider the years of experience and resources that the AG’s Privacy Unit has in comparison to a brand-new agency.

In essence, bill opponents argue here that the absence of a statute of limitations in a ballot initiative (Proposition 24) is due to the fact that the newly-formed Privacy Agency would require several years to develop its enforcement capabilities, and therefore would need more time than the (well-established) Department of Justice to bring its initial enforcement actions.

This argument is dubious. Given the significant expense and difficulty of enacting a ballot initiative—a law that can only be repealed by the voters—and the rarity with which enacted initiatives are repealed, the drafters of the California Privacy Rights Act could reasonably expect that the Act would remain in effect forever. It is hard to believe that the drafters would have deliberately shortened the Attorney General’s enforcement ability, relative to the Privacy Agency’s, in perpetuity simply because it would take the Privacy Agency a few years to become fully operational.

Moreover, if Proposition 24’s drafters had recognized that the Privacy Agency would initially require additional time to bring enforcement actions they could have easily provided a longer limitations period during the first period of the Privacy Agency’s existence, then scaled this period back to match the period granted the Attorney General. But Proposition 24 made no such explicit allowance for the Privacy Agency’s start-up period.

Finally, what is perhaps most significant is the text of Civil Code section 1798.199.90, which this bill would amend. Subdivision (d) of that section provides:

(d) No civil action may be filed by the Attorney General under this section for any violation of this title after the [Privacy Agency] has issued a decision pursuant to Section 1798.199.85 or an order pursuant to Section 1798.199.55 against that person for the same violation.

That is, if the Privacy Agency finds that a business violated the CCPA in an administrative proceeding, the Attorney General cannot then sue the business for identical CCPA violations. The statutory and regulatory procedures that govern the Privacy Agency’s conduct of an administrative proceeding are involved and time-consuming. First, the Privacy Agency can investigate possible CCPA violations based either on a third party’s sworn complaint or on its own initiative. (Civ. Code § 1798.199.45.) The Privacy Agency has subpoena power and can go to court to enforce a subpoena if a response is not forthcoming. (Civ. Code § 1798.199.65.) If it finds evidence of violations, the Privacy Agency next has to hold a probable cause hearing, preceded by at least 30 days’ notice to the alleged violator. (Civ. Code § 1798.199.50.) If the Privacy Agency determines that there is probable cause for CCPA violations, it may only then proceed with a formal hearing to determine whether a violation occurred. (Civ. Code § 1798.199.55.)

Given the intricacy of these steps, it is hard to believe that the Privacy Agency would be able to complete a CCPA enforcement action within one year of a violation. Yet that is what the opponents of this bill are arguing: that the drafters of Proposition 24 intended to forbid the Attorney General both (i) from suing a business more than one year after it violates the CCPA **and** (ii) from suing a business for the same violations that the Privacy Agency previously prosecuted successfully—even though the Privacy Agency will almost certainly take longer than one year to complete its enforcement action. Subdivision (d), quoted above, would make far more sense if the Attorney General had the same amount of time as the Privacy Agency to pursue CCPA violations.

6) Analysis: A longer statute of limitations does not place additional administrative burdens on businesses. One of the more curious opposition arguments is that equalizing the statutes of limitations for civil and administrative CCPA enforcement would somehow increase businesses’ current data retention burdens. The opposition coalition writes: “A five-year statute of limitations only further incentivizes businesses to retain all consumer information for five years, contravening pro-privacy and data minimization principles, and exposes both businesses

and consumers alike to high risks associated with data breaches.” But this bills add no such “incentive,” because businesses must already retain the relevant information for five years in case the Privacy Agency decides to pursue administrative enforcement. The same information would be at issue in a civil or an administrative proceeding, so the potential of civil enforcement by the Attorney General for a longer period of time should not affect businesses’ data retention practices or requirements.

An actual burden imposed by a one-year statute of limitations is that a business may be exposed to two parallel enforcement actions, one civil and one administrative, rather than a single civil lawsuit. The opposition coalition appears to ignore this possibility when it writes that “violations can still feasibly be pursued by the Privacy Agency for up to five years. In the rare event that the AG’s clock runs out to commence an enforcement action, this ‘fallback’ ensures that consumer rights are still protected.” But this argument fails to recognize that a business’s conduct may violate privacy laws other than the CCPA. In this situation, if one year proves insufficient for the Attorney General to develop its CCPA claims, then the Attorney General may well file suit alleging non-CCPA claims, while the Privacy Agency then proceeds with administrative enforcement under the CCPA. This would expose the business to all of the costs and burdens of defending two actions simultaneously. By contrast, if the Attorney General was granted the same statute of limitations as the Privacy Agency, the CCPA violations could easily be folded into a single civil lawsuit, with no additional enforcement by the Privacy Agency. Civil Code section 1798.199.90 expressly contemplates this possibility. It permits the Attorney General to request that the Privacy Agency “stay an administrative action or investigation under [the CCPA] to permit the Attorney General to proceed with an investigation or civil action”; if this occurs, the Privacy Agency may not continue with administrative enforcement unless “the Attorney General subsequently determines not to pursue and investigation or civil action.” (Civ. Code § 1798.199.90(c).) In other words, a longer statute of limitations for the Attorney General may, paradoxically, mean lower burdens for businesses which might otherwise face simultaneous civil and administrative cases.

7) Analysis: This bill furthers the purpose and intent of the California Privacy Rights Act.

To protect Californians from potential efforts to weaken statutory protections in the California Privacy Rights Act, Proposition 24 provided that the Act may be amended by a majority vote of the Legislature only if the amendments are consistent with and further the Act’s purpose and intent, *i.e.*, to further protect consumers’ rights, including the constitutional right of privacy. (Ballot Pamphlet., Primary Elec. (Nov. 3, 2020) text of Prop. 24, § 25, pp. 74-5.) With the passage of the CCPA, as subsequently amended by Proposition 24, California has the most comprehensive laws in the country when it comes to protecting consumers’ rights to privacy.

Yet these rights have little meaning without adequate enforcement. As should be clear from the discussion above, it will be challenging for the Attorney General to thoroughly investigate and prepare a civil lawsuit for CCPA violations within one year. The risk is that the Attorney General may have no choice but to quickly sue targets, without the opportunity for a full investigation, to unilaterally toll the statute of limitations and preserve the ability to seek appropriate penalties. A longer statute of limitations will allow the Attorney General’s Office more time to engage with businesses and address issues fully, perhaps avoiding an unnecessary lawsuit, as opposed to the more heavy-handed alternative of having to sue quickly. In other words, a longer statute of limitations may end up benefitting businesses by giving them more time to demonstrate CCPA compliance and thereby avoid litigation.

Ultimately, the deterrent of facing either a potential lawsuit by the Attorney General or a potential administrative enforcement action by the Privacy Agency ought to increase business compliance with the CCPA. Conversely, the diminished risk of a lawsuit with a one-year statute of limitations may cause businesses to slacken in their compliance.

By extending the statute of limitations for civil CCPA enforcement, this bill would enhance the ability of the Attorney General's Office to carry out its statutory duty to enforce CCPA and protect the consumer privacy of all Californians, including underserved and marginalized communities.

In other words, passage of this bill would enhance California consumers' privacy and further the purpose and intent of the California Privacy Rights Act, as required by Proposition 24.

ARGUMENTS IN SUPPORT: Oakland Privacy explains the need for this bill:

Privacy harms, or violations of the right to know, right to correct and right to delete, do not always come to light immediately. In some cases, consumers might not be aware that their instructions are not being followed, or it may take some time to connect a quantity of consumer complaints with a widespread and significant violation of Act after review and investigation. [...] The statute of limitations needs to be sufficient for harms to become apparent and for their full scope to be accurately investigated.

ARGUMENTS IN OPPOSITION: The Civil Justice Association of California argues that this bill is unnecessary:

The Attorney General's office has been clear that it is vigorously enforcing the CCPA. Thus, there is no reason to extend the enforcement window to five years, rather than the one year originally negotiated in statute. This is further compounded by the fact that there is consensus that the vast majority of statutory violations are likely to be technical errors or minor issues easily addressed in a one-year window.

REGISTERED SUPPORT / OPPOSITION:

Support

Office of Attorney General Rob Bonta (sponsor)
Electronic Frontier Foundation
Oakland Privacy

Opposition

American Financial Services Association
California Chamber of Commerce
California Credit Union League
California Financial Services Association
California Grocers Association
California League of Food Producers
California Manufacturers & Technology Association
California Retailers Association
Card Coalition

Civil Justice Association of California
Computer & Communications Industry Association
Insights Association
National Payroll Reporting Consortium
Netchoice
Software & Information Industry Association
State Privacy and Security Coalition, Inc.
Technet

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